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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 125

ANDREW DeGRAZIA,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Andrew De Grazia, respectfully prays for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 28, 1948, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

The Opinions Below.

The District Court denied the motion of the petitioner to suppress the evidence, certain narcotics, and allowed the admission of the same and found the petitioner guilty and imposed sentence. The Circuit Court of Appeals affirmed the judgment of the District Court without an opinion (R. 45.) and hence, there is no reported opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 28, 1948 (R. 45.). The jurisdiction of this court is invoked under Rule 37b(2) of the Rules of Criminal Procedure.

Questions Presented.

Whether a search warrant is legally issued and the evidence seized thereunder is admissible where the United States Commissioner, after an examination of affiant and of his affidavits and sworn complaint, finds and states in the search warrant that affiant entered the premises used and occupied by the petitioner, "being the 3rd house" from a certain corner, and then and there detected the fumes of smoking opium, it appearing from the evidence, heard on the motion to suppress, that affiant did not have a search warrant at the time he entered the said house.

Statement of the Case.

This petition presents for correction, errors of the District Court of the United States for the Northern District of Illinois, Eastern Division, erroneously affirmed by the United States Circuit Court of Appeals for the Seventh Circuit.

The indictment (R. 2) charged, in Count 1, that the defendant on March 6, 1946, at Melrose Park, in the Northern District of Illinois, knowingly concealed and facilitated the concealment and transportation of 200 grains of smoking opium, the same having been imported into the United States of America contrary to law. Count 2 charged that the defendant, at the same time and place, concealed and facilitated the concealment and transportation of 70 grains of yen shee, a derivative of opium, the same having been imported into the United States of America contrary to law. Count 3 charged that the defendant at the same time and place, purchased and had in his possession 200 grains of smoking opium and 70 grains of yen shee, a dirivative of opium not in and not from the original stamped package and not bearing the appropriate tax stamps.

The Court found the defendant guilty in each of the three counts and sentenced him to serve a year and a day on each of the said counts to run concurrently (R. 35).

Prior to the trial, the defendant filed a sworn written motion to quash the search warrant and to suppress the evidence (R. 5-7). The principal ground upon which the motion to quash, as set forth therein, is:

> "(d) The affidavit upon which search warrant was issued states that George H. White, the affiant therein did on the 5th day of March, 1946, one day prior to the aforesaid search and seizure, enter the aforesaid premises located at 1413 23rd Avenue, Melrose Park, Illinois, and did then and there detect fumes of smoking opium; that at the time the said George H. White so entered the premises on the 5th day of March, 1946, he was not possessed of a search warrant issued by any proper authority of the United States of America."

Two affidavits for a search warrant and a complaint for a search warrant were introduced into evidence.

Exhibit No. 1 is an affidavit signed by George H. White, District Supervisor of the Bureau of Narcotics, in which he deposed as follows:

> "That on the 5th day of March, A. D. 1946, he entered the premises at 1413 23rd Ave., Melrose Park, a one family frame building, 3rd house South from South-East corner 23rd & Division, being used and occupied by DeGrazia @ "The Goat" in the City of Melrose, County of Cook, and State of Illinois, and from the exterior of the building did detect the fumes of smoking opium.
>
> The said Geo. H. White further states that the smoking opium did not bear the appropriate Internal Revenue Stamps as required by the Act of December 17, 1914, as amended, known as the Harrison Narcotic Act as amended, and that coca leaves or compounds, salts, derivatives, or preparations thereof, and that opium of compounds, salts, derivatives, or preparations thereof, upon which the tax required by the said Act as amended has not been paid, then and there were and are now being kept for sale on the premises by the said
>
> Geo. H. White,
>
> Dist. Super. Bur. of Narcotics (R. 28, 29)."

Exhibit No. 3 (R. 31), is the same as Exhibit No. 1, except that it was sworn to before Commissioner Walker; and did not have the allegation that the opium derivatives were being kept "for sale" on the premises. The last line in Exhibit No. 3 read that the opium derivatives, etc., "are now being kept on the said premises by the said DeGrazia, @ 'The Goat'" (R. 32); the last allegation of Exhibit No. 1 was that the opium derivatives, etc., "then and there were and are being *kept for sale* on the said premises by the said DeGrazia, @ 'The Goat'" (R. 29).

Exhibit No. 2 is a complaint signed, sworn to, and filed, by the said George H. White (R. 29). Therein he says:

> "that he has reason to believe and does believe that coca leaves or compounds, salts, derivatives, or preparations thereof, to-wit: cocaine, and opium or com-

pounds, salts, derivatives, or preparations thereof, to-wit: morphine, are being sold, bought, possessed, and concealed contrary to law, and a fraud upon the revenue of the United States has been or is being committed by one DeGrazia, alias "The Goat" upon or by use of the premises occupied by the said DeGrazia, alias "The Goat", a one family frame building, located at 1413 23rd Ave., Melrose Park, Ill., being the third house south from the S.E. corner of 23rd and Division, City of Melrose Park, County of Cook, State of Illinois.

"The belief of this affiant and complainant is based on the following facts: that is, the affidavit made by one George H. White hereto attached; that on the 5th day of March, 1946, the said George H. White entered the premises being used and occupied by the said DeGrazia, alias "The Goat" at 1413 23rd Ave., (third house S. from the S.E. corner of 23rd and Division) in the City of Melrose Park, County of Cook, State of Illinois, and then and there did detect the fumes of smoking opium; Deponent further states that the said smoking opium did not bear the appropriate internal revenue stamps as required by the Act of December 17, 1914, as amended, and further that the said smoking opium upon which the tax required by the said Act, as amended, has not been paid, then and there were and are now on the said premises by the said DeGrazia, alias "The Goat";

Wherefore, the above affiant prays for the issuance of a search warrant to search the above described premises for the purpose of securing any coca leaves or opium, or compounds, salts, derivatives or preparations thereof, and any money connected therewith, and used in connection with the commission of the said fraud."

The search warrant authorized a search of DeGrazia's home in the day time or the night time (R. 33) and recited that Mr. White made affidavit that on March 5th he entered the premises used and occupied by DeGrazia at 1413 23rd Street, Melrose Park, being the *3rd house* S. from the S. E. corner of 23rd & Division, City of Melrose Park, County of Cook and State of Illinois, and *"then and there* did detect

the fumes of smoking opium and that the smoking opium did not bear appropriate internal revenue tax paid stamps" (R. 32). The search warrant further recited (R. 33):

> "And Whereas, complaint on oath and in writing has this day been made before me, Edwin K. Walker, a United States Commission for the Northern District of Illinois, by one George H. White, who deposes and says that he is a Narcotic Officer; that he has reasonable cause to believe, and does believe, that the Act of December 17, 1914, known as the Harrison Narcotic Law, as amended, is being violated by the sale, purchase, possession, and concealment of opium, or compounds, salts, derivatives, or preparations thereof, and a fraud upon the revenue of the United States has been and is being committed by one DeGrazia, alias "The Goat" upon or by use of the premises occupied by said DeGrazia, alias "The Goat", a *one family frame building* located at 1413 23rd Ave., being the *3rd house* S. from the S.E. corner of 23rd and Division, City of Melrose Park, County of Cook, and State of Illinois; that the belief of this affiant and complainant is based upon the aforementioned affidavit of George H. White."

The trial Court denied petitioner's motion to quash the search warrant and suppress the evidence and admitted the narcotics seized under the serach warrant in evidence.

At the hearing of the motion to quash the search warrant and suppress the evidence, Mr. White, the affiant in the foregoing affidavits and the complainant in the complaint for search warrant testified that on March 5, 1946, he did not have a search warrant to search the premises. There was an examination by the Commissioner prior to the issuance of the warrant (R. 10).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred in affirming the judgment of the District Court denying the motion of petitioner to quash the search warrant and suppress the evidence seized thereunder. The constitutional right of the petitioner was violated by the issuance of the search warrant which was based upon knowledge obtained from a search of the petitioner's home made without a search warrant.

Reasons for Granting the Writ.

1. The constitutional rights of the petitioner was invaded by the issuance of a search warrant based upon knowledge illegally obtained in a search of the petitioner's home made without a search warrant.

2. The examination by the commissioner of the affiant in the affidavits and complaint for search warrant, as recited in the search warrant, caused the Commissioner to find and recite in the search warrant that the affiant previously entered the home of the petitioner and then and there detected the fumes of smoking opium. At the time the said affiant entered the home of the petitioner he did not have a search warrant and his knowledge that opium was on the premises was illegally obtained and could not be used to obtain a search warrant or for any other purpose. In affirming the judgment of the District Court overruling the motion to quash and suppress the evidence, the Circuit Court of Appeals is in conflict with the opinion and decision of the United States Supreme Court in the case of *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; 84 L. Ed. 319; 40 S. Ct. 182.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

MYER H. GLADSTONE,
Of Counsel.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

May it Please the Honorable Justices of the Supreme Court of the United States:

At the hearing of the Motion to Quash the search warrant, Mr. White testified on cross-examination: "On March 5, 1946, I did not have a search warrant to search those premises" (R. 14). The entry made by White of DeGrazia's home on March 5, 1946 violated the Fourth and Fifth Amendments to the Constitution, the United States Statutes with respect to Search and Seizure (Title 18, U.S. C.A., Sections 611-616), and Rule 41 of the Federal Rules of Criminal Procedure. The knowledge he obtained by reason of that illegal search could not be used as the basis of a search warrant or for any other purpose. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, 84 L. Ed. 319, 40 S. Ct. 182.

In this case it is stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the Court but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If *knowledge* of them is gained from an independent source they may be proved like any others, but the *knowledge* gained by the Government's own wrong cannot be used by it in the way proposed." (Italics ours.)

It is obvious that *knowledge* of the existence and location of contraband articles may be determined by the sense of smell. In the instant case it was *knowledge* gained from the sense of smell upon which the search warrant was sought and upon which it was issued.

The search warrant found positively that George White made affidavit that he entered *the premises* being used and occupied by DeGrazia, said premises being located at 1413 23rd Ave., Melrose Park, Ill., *being the 3rd house S.* from the S. E. corner of 23rd and Division (R. 32). After White entered the premises he, according to the positive averment of the search warrant "then and there did detect the fumes of smoking opium". In the next paragraph of the search warrant, the premises are further described as occupied by DeGrazia, and as "a one family frame building located at 1413 23rd Ave., being the 3rd house S. from the S. E. corner of 23rd and Division" (R. 33). The warrant authorizes the entry of the "said premises" and the search of "the above described premises" (R. 33).

The sworn complaint also refers to the premises occupied by DeGrazia "a one family frame building" (R. 29) and refers to the affidavit of George White. The complaint again repeats the statement that White entered the premises being "used and occupied" by the said DeGrazia "at 1413 23rd Ave., (3rd house S. from the S. E. corner of 23rd and Division.")

The findings and conclusions of the Commissioner who issued the warrant as stated therein is the result of compliance with the requirements of Section 614, Title 18, U. S. C. A., viz:

> "The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Since the statute requires the issuing officer to examine, on oath, the affiant in order to inquire into the truth of the affidavit offered, this provision must be complied with. This was so held in the case of *Steele* v. *United States*, 267 U. S.

498, 501, where the Court in discussing a similar provision in the Espionage Act of June 15, 1917, observed:

> "* * * the warrant can be issued only upon probable cause, supported by affidavit, particularly describing the property and place to be searched. The judge or commissioner *must* before issuing the warrant *examine* on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. If the judge or commissioner is satisfied of the existence of the grounds for the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, *stating the particular grounds or probable cause for its issue* and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner." (Italics ours.)

The Commissioner made certain legal conclusions from the facts stated in an unsworn document, the sworn complaint and the testimony of White. The statement that White entered the home of DeGrazia and there detected the fumes of smoking opium must be regarded as the legal conclusion of Commissioner Walker from the unsworn document, labeled an affidavit, and from the complaint and testimony of Mr. White.

In the case of *Siden* v. *United States* (C. C. A. 8) 9 F. 2d 241, 243, the Court said:

> "The probable cause, indispensable to the unlawful issue of a search warrant under these sections of the Act of Congress, is the legal conclusion of the magistrate from the facts stated in the affidavits, depositions, or testimony. Without a statement in those

affidavits, depositions, or testimony of facts sufficient to sustain such a conclusion, the search warrant may not lawfully issue. The statement of the sustaining facts showing probable cause is as indispensable to the lawful issue of a search warrant as the legal conclusion that such cause exists. When the facts on which the magistrate's conclusion of probable cause is based are not stated in the affidavits, depositions, or testimony on which that conclusion rests, the warrant cannot be sustained, because there is no criterion by which a court can determine whether or not there were facts showing probable cause, and the unavoidable legal conclusion is that there were not."

Respectfully submitted,

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MYER H. GLADSTONE,
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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 125

ANDREW DEGRAZIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on a three-count indictment charging the unlawful concealment and possession of smoking opium and yen shee, and he was sentenced to imprisonment for a year and a day on each count, the sentences to run concurrently (R. 2-3, 27). On appeal, the judgment was affirmed without opinion (R. 45).

The sole question raised concerns the validity of a search warrant under which the opium and yen shee were seized. The warrant, issued March 6, 1946 (Gov. Ex. 4, R. 32-34), recites that it is based on the affidavit and complaint of George H. White, sworn to before the commissioner (see Gov. Exs. 2 and 3, R. 29-32). White's affidavit recites that on March 5, 1946, he "entered the premises at 1413 23rd Ave., Melrose Park, Illinois, a one family frame building, * * * and from the exterior of the building did detect the fumes of smoking opium" (R. 31). Cf. *Johnson* v. *United States*, 333 U. S. 10, 13. The complaint and warrant, each of which refer to the affidavit, recite merely that White "entered the premises" and detected the fumes. (R. 29-30, 32).

Petitioner's contention appears to be that, since the warrant recites that White had "entered the premises" on March 5, and since White admitted at the hearing on the motion to quash the warrant that he had no warrant on March 5, when he detected the fumes (R. 14), the original entry by White on that date was an illegal search, and, hence, that evidence obtained as the result thereof could not be used to obtain a search warrant. It is evident, however, from White's affidavit, referred to in the warrant, that the "entry" on March 5 was not an entry into the house, but an observation "from the exterior of the building." See also R. 9, 18. Assuming that White was on land owned

by petitioner at the time he made his observations, such an entry on lands outside a building is not an illegal search. As this Court, speaking through Mr. Justice Holmes, said in *Hester* v. *United States*, 265 U. S. 57, 59:

> * * * the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1948.

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